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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 351

EMIL STEIN AND WILLIAM B. STEIN,
Petitioners and Appellants below,

vs.

PRESTON DELANO, Comptroller of the Currency, and L. M. REED, Substituted Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey,
Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAUL J. ZUCKER AND
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioners.
744 Broad Street,
Newark, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, EMIL STEIN and WILLIAM B. STEIN, respectfully show:

I.

Summary Statement of the Matter Involved.

The within application for a writ of certiorari is prosecuted to review a judgment of the United States Circuit

Court of Appeals for the Third Circuit entered July 17, 1942 (R. 28a), affirming a judgment entered in the United States District Court for the District of New Jersey on January 19, 1942, dismissing petitioners' application for costs and counsel fees to be taxed against the fund in the possession of respondents (R. 25a). The fund and this litigation arose out of the receivership of a national bank.

The fund in question (over $500,000.00) had been brought under the practical control of the district court through the efforts of petitioners' counsel, who, realizing at the inception of this litigation that unless the fund was in existence at the conclusion thereof, their efforts to test the legal questions involved would be purely academic. Accordingly, at the outset, an application for the appointment of a custodial receiver or trustee of the fund was pressed, and resulted in a stipulation by respondents in open court on March 18, 1940 (R. pp. 13a-14a) to the effect that distribution of the fund would await the final determination of the conflicting claims against it, and that the respondents would

> "* * * preserve intact the funds available for distribution to stockholders or creditors until the question of who is entitled to said funds shall have been determined."

A consideration of the basic questions on this application necessitates a brief review of the background of the underlying litigation:

The New Jersey National Bank and Trust Company of Newark, N. J., suspended banking operations in June, 1932, when the Comptroller of the Currency appointed a receiver

to take over its assets. An assessment of 100% upon the outstanding capital stock of $2,800,000 was levied, and over $1,000,000 was collected from the stockholders.

From the liquidation of the bank's assets and the collection of the stockholders assessments, the successive receivers appointed by the Comptroller of the Currency paid dividends to the depositors from time to time, until shortly prior to the institution of this suit the depositors had received and accepted their "fifth final principal dividend" making a total of 100% of the principal amount of their deposits.

The payment of the final principal dividend left approximately $750,000 in liquid assets (of which about $500,000 was in cash) in the possession of the comptroller and his receiver. They threatened to pay this money to the depositors as "interest upon their deposits".

Petitioners, as stockholders, who had either paid or were being held liable for their respective assessments, consulted counsel, and were advised that under the law of New Jersey the acceptance of the principal of a debt destroys the right to claim interest thereon for delay in payment, in the absence of an *express* contract; that the relationship between a bank and its depositor was that of simple debtor and creditor without any express contract to pay interest on deposits; and that in counsel's opinion, *Erie R. R.* v. *Tompkins*,[1] and the cases interpreting it, required the application of New Jersey local law in determining whether the depositors were entitled to interest after accepting the principal of their deposits in full.

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[1] 304 U. S. 64.

Accordingly, petitioners conceived that whatever the law was prior to *Erie R. R.* v. *Tompkins, supra*—and there appeared to be only one authority in the Supreme Court allowing moratory interest in national bank receiverships notwithstanding the acceptance of the full principal of a deposit[1]—it was no longer applicable. Just as local statutes of limitation were held to fix the periods within which a national bank assessment could be sued upon,[2] it was deemed that local New Jersey law would apply to the issues in the case at bar. While it was true that jurisdiction of the federal court was not based upon diversity of citizenship, it was felt that the doctrine of *Erie* v. *Tompkins* was not to be limited in its application to diversity cases only. A subsequent decision of this court lends considerable justification for maintaining that view.[3]

Suit was thereupon begun by petitioners on their own behalf, and on behalf of all the other stockholders and the bank itself, to determine the legal ownership of the fund remaining in the possession of respondents after payment to, and acceptance by, the depositors of 100% of their claims. Other stockholders promptly intervened and when the issue was submitted to the District Court, petitioners represented the owners of 8,778 shares of stock.

Upon the filing of the complaint which charged that the remaining assets in the possession of respondents constituted a trust fund for the benefit of the bank and its stockholders, the District Court allowed an order directed to the defendants to show cause among other things, why,

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1 *Nat'l Bk.* v. *Mechanics Nat'l Bk.*, 94 U. S. 437 (1876).
2 *Rawlings* v. *Ray*, 312 U. S. 96.
3 See *D'Oench, etc.* v. *F. D. I. C.*, 86 Law Ed. Adv. Op. No. 206—March 2, 1942.

pendente lite, a receiver or trustee should not be appointed of the fund in question. Upon the return day, counsel for the respective parties—the Comptroller being represented by a member of the legal staff of the Washington office—conferred before the argument, and agreed as follows:

1—that the "interest question" raised by petitioners was one with which the respondents were vitally concerned, and one upon which they were desirous of having a current U. S. Supreme Court ruling—the last decision in point having been rendered about 75 years ago, and *Erie R. R.* v. *Tompkins, supra,* having created new approaches with possible drastic changes in results (R. 11a);

2—that in consideration of petitioners not pressing for the appointment of a receiver or trustee *pendente lite,* respondents would *achieve the same result* by entering a stipulation upon the record that the fund would be held by them, and remain intact until a final decision upon the merits was rendered (R. p. 11a);

3—that both parties would cooperate in using this case as the vehicle for presenting the meritorious questions involving interest to the U. S. Supreme Court (R. p. 12a)—petitioners representing the stockholders' views, and respondents urging the depositors' arguments.

4—that respondents' motion to dismiss the complaint and petitioners' resistance thereto were to be treated as a final hearing, leading to a final judgment—all for the purpose of confining the issues, and obtaining a speedy determination with a minimum of expense, in order that the issues might be presented to the ap-

pellate courts as soon as possible, respondents stating that other national bank liquidations involving the same issues were awaiting the decision in this case before final distributions.

The District Court conceded that under New Jersey local law the acceptance of the full principal of a debt discharges any liability for moratory interest thereon, but further held that the facts in this case made it an *exception to the general rule.*[1] Federal, and not New Jersey law was apparently applied. The complaint was dismissed.

The order dismissing the complaint was entered November 25, 1940, *and specifically reserved all applications for costs and counsel fees* (R. p. 3a).

In accordance with the arrangement between counsel to appeal the decision, petitioners perfected an appeal to the Circuit Court of Appeals for the Third Circuit.

An opinion setting out an historical analysis of "interest", was filed, affirming the District Court in its dismissal of the complaint.[2] Again, New Jersey local law was rejected, and federal law applied.

Petitioners filed a petition for certiorari in this court. Certiorari was denied on October 13, 1941.

A petition for rehearing was promptly filed, based solely upon the importance of the national issues involved—which had been only lightly stressed in the original petition, petitioners having expected respondents to join in the prayer for the allowance of the writ. Rehearing was denied November 10, 1941.

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1 35 Fed. Supp. 260.
2 121 Fed. (2nd) 975.

Eleven days later petitioners learned of a pertinent decision recently filed.[1] That case held that in a suit by a national bank receiver against a stockholder to recover an assessment and interest, the question of whether the acceptance of the full principal destroyed the liability for moratory interest was to be governed by local Illinois law—and not by any federal common law.

On the basis of a direct conflict between the *Garvy* case in the Seventh Circuit and this case in the Third Circuit (121 Fed. 2nd 975), petitioners filed a motion in this court for leave to file a second petition for rehearing—the time to file the petition as a matter of right having expired. On December 8, 1941, the motion was granted, but the petition for re-hearing was denied.

The action of the Supreme Court in granting the motion but denying the rehearing can be reconciled on the following ground: on the very day that the foregoing rulings were filed, the decision in *American Surety* v. *Bethlehem Nat'l B'k*,[2] was announced, holding that all substantive legal questions arising under the "National Banking Act" are to be governed by federal law—and not local law—regardless of whether the question involved is *specifically* covered by the particular federal statute.

As a result, and notwithstanding the denial of certiorari in the case at bar, the meritorious questions involved herein have, for all practical purposes, been passed upon by this court. It has now been decided that the depositors' rights to moratory interest, notwithstanding the acceptance of the

[1] *Garvy, Recv'r,* v. *Wilder,* 121 Fed. (2nd) 714, 7th Circuit—Sept. 8, 1941.
[2] 314 U. S. 314.

full principal of their deposits, is a matter of federal and not local law.

In the light of the issues raised on the pending appeal it is important to bear in mind that the issue of whether federal or local law should prevail on the "interest question" cannot be said to have been definitely settled until December 8, 1941.

The merits having been disposed of, petitioners moved before the District Court for the allowance of counsel fees, their expenses in prosecuting this suit, and their taxed costs —all to be chargeable against the fund which, through petitioners' efforts, had been brought under the practical control of the court by the stipulation hereinbefore mentioned. Petitioners' application was made pursuant to the reservation contained in the order dismissing the complaint (R. p. 4a).

The District Court conceded that it had the *power* to make the allowances prayed and said:

> "The Court has usually exercised this discretion where a party through his efforts has brought a fund before the court, * * *". (R. 24a.)

That is exactly what petitioners claim to have done— "brought a fund before the court". The stipulation by respondents in open court, produced by and through the efforts of petitioners' counsel, just as effectively brought the fund under the control of the court as though a court trustee or receiver had been appointed and physically took the fund into his possession.

Then the District Court went on to say:

> "The action of the plaintiffs and the services performed by Messrs. Kristeller and Zucker are not within the theory aforesaid. *The Court reaches this conclusion reluctantly. It knows that the plaintiffs* because of double liability *contributed to and created* if not all, at least *a substantial part of the fund which would be charged and they should be saved at least part of the expense they have incurred* if it could be done without abusing our discretion.
>
> The application is denied." (R. 24a and 25a.)

An appeal was prosecuted to the Circuit Court of Appeals for the Third Circuit on the ground (a) that the district court erred in deciding the application as a matter of law, and (b) that if the court exercised its discretion, there was an abuse of discretion.

The circuit court affirmed the district court, apparently deciding the matter as a question of law rather than as one requiring the exercise of discretion. (R. 27a.)

This review is sought because the application below was not considered in accordance with the principles enunciated by this court in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed, was July 17, 1942. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this Court to issue the writ of certiorari herein prayed for, is invoked under the Judicial Code, Sec. 240 (a) as amended by the act of February 13, 1925, 43 Stat. 938, (Title 28 U. S. C. Sec. 347).

3. *Petitioners* claim that they qualify for the allowance of costs and counsel fees chargeable to the fund in the possession of respondents since the underlying litigation was *bona fide,* meritorious, beneficial to the receivership, and fostered and invited by respondents to the end that a decision on the "interest question" be obtained from the court of last resort.

Respondents claim that since petitioners were unsuccessful in the underlying litigation, and since their efforts did not actually create a fund, that they are not entitled to charge the fund with costs and counsel fees.

4. Petitions for writs of certiorari to review decisions of the Circuit Courts of Appeal have been granted where the issue was of national importance because it involved the administration of the "National Banking Act." *Deitrich* v. *Greaney,* 309 U. S. 190.

Petitions for writs of certiorari to review decisions of the Circuit Courts of Appeal have been granted where the issue was of national importance because it involved a question of judicial administration pertaining to the exercise of general federal equity jurisdiction. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161.

III.

The Questions Presented.

1. Are stockholders of a national bank in receivership, who have in good faith prosecuted litigation with the approval of the receiver and comptroller of the currency, for the sole purpose of determining the rightful ownership of the fund remaining after creditors had received 100% of the principal of their claims, entitled to costs and counsel fees out of the fund, distribution of which depended upon and was withheld pending the outcome of the suit?

2. Should the issue presented in the foregoing question —as a matter of general federal equity administration—be determined as a matter of law, or must the court consider all the equities involved before exercising its discretion?

IV.

Reasons Relied Upon for the Allowance of the Writ.

1.

The public importance of the question in the administration of the "National Banking Act."

The liquidation of national banks involves the distribution of hundreds of millions of dollars in various locations throughout the length and breadth of the United States. In determining proper ownership of such vast sums, intricate and involved questions often arise. In most instances the receiver will take the laboring oar and apply

to the courts for instructions, institute a suit for a declaratory judgment, or bring a class action to determine the rights of respective claimants.

But, frequently a receiver does not take the initiative, and judicial action is instituted by some class of claimants. Disregarding those actions which are palpably frivolous, and confining our consideration to those suits which are brought in good faith, are welcomed and fostered by the receiver as a means of solving a possibly troublesome situation, are dispositive of the questions involved, and actually relieve the class benefited from further litigation to settle the various rights, what attitude should the courts take in charging the fund with costs and counsel fees—regardless of which class prevails—if the litigation has been beneficial to the liquidation?

For example, the submission of the "interest question" in the case at bar to judicial solution was deemed sufficiently important to the Comptroller of the Currency to hold up ultimate distribution until final judgment, not only in the instant case, but in the receivership of the First National Bank of Detroit where the surplus after the payment of 100% of principal to depositors amounted to about $25,000,000.00.

Under such circumstances there ought to be adopted a definite policy by the courts as to whether the fund may be properly charged with costs. And this policy ought to be established with due regard to provisions and purposes of the "National Banking Act".

If, perchance, a troublesome issue could only be solved by judicial determination, why shouldn't the cost thereof

be chargeable to the fund regardless of at whose initiative the result is achieved? Certainly, if the receiver had sued for declaratory judgment, the fund would have borne the costs. The same result achieved at the instance of petitioners through litigation welcomed and fostered by the receiver and comptroller ought to carry the same consequences.

In any event, the issue is of sufficient importance in the administration of the "National Banking Act" to merit this court's consideration. Certiorari was allowed in *Deitrich* v. *Greaney*, 309 U. S. 190, because of the public importance of the question in the administration of the "National Banking Act".

It is submitted that the issue in the instant case is deserving of the same treatment.

2.

The importance of the question of judicial administration pertaining to the exercise of federal equity jurisdiction.

Certiorari was granted in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, for the reason that an important question of judicial administration pertaining to federal equity jurisdiction was involved.

In the instant case a similar question of equal importance is involved.

In the *Sprague* case the underlying question was whether a fund in the possession of the defendants, (but not under the *actual* control of the court) could be charged with costs and counsel fees based upon the benefits accruing to interests similarly situated to that of the plaintiff.

In the instant case the question is whether litigation, admittedly beneficial to the receivership, warrants the allowance of costs and counsel fees from the fund to the parties prosecuting the litigation. True, in the *Sprague* case the plaintiff was successful, and in the case at bar the petitioners were unsuccessful. But nowhere in the *Sprague* opinion is it indicated that success is the *sine qua non* of an allowance. On the contrary the foot-note references are to authorities holding that allowances may properly be made to *unsuccessful* parties where a necessary rule of distribution has been established by litigation instituted by them.

It is submitted that the settlement of the federal equity question raised in the case at bar is a corollary to and just as important to the bar in general as that raised in the *Sprague* case. It can be resolved by the granting of certiorari.

3.

The Circuit Court of Appeals, in denying petitioners the allowance of costs and counsel fees as a matter of law, has decided a federal question in a way probably in conflict with applicable decisions of this court.

The decisions in the Circuit Court of Appeals below, (R. 27a) affirmed the district court upon the authority of the two cases cited therein. In so doing the court held that the district court was correct in its denial of costs and counsel fees as a matter of law.

Sprague v. *Ticonic National Bank,* (307 U. S. 161), recently decided by this court, clearly set forth the nature of the equities upon which an allowance of "solicitor-client" costs may be predicated. The actual creation of a

fund or the technical existence of a class action were held not to be essential to an allowance of costs and counsel fees if other equitable considerations warranted the allowance.

In the case at bar, the circuit court, in affirming the district court, held, in effect, that petitioners did not come within the defined classes entitled to costs and counsel fees, to wit:

> "The court has usually exercised this discretion where a party through his efforts has brought a fund before the court, prevented the dissipation of the fund or has created the fund or has in some manner conserved it, or where some other party or class will benefit by the distribution of the fund without having contributed to its successful creation or maintenance" (R. 24a).

Such action by the circuit court seems to disregard the *Sprague* case. True, petitioners were not the prevailing parties in the litigation on the merits, (as they were in the *Sprague* case) but other equities adequately supplanted that deficiency. For example, the recognition by respondents of the meritorious nature of the "interest question", the practical invitation to litigate it to the Supreme Court to settle the issue once and for all, and the voluntary stipulation to retain the fund intact until the merits were finally concluded, all furnish ample grounds for the exercise of judicial discretion in acting upon the application for costs and counsel fees, rather than for the abrupt dismissal on the ground that petitioners couldn't qualify for such costs *as a matter of law.*

The question of the allowance of costs and counsel fees is one in which the public, as well as the bar generally, is

intensely interested. An extension, limitation, or general clarification of the principles enunciated in the *Sprague* case would do much to avoid a repetition of similar litigations. The allowance of certiorari would accomplish that end.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a transcript of the record and proceedings herein; and that the judgments of the United States District Court for the District of New Jersey and the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated: August 25, 1942.

SAUL J. ZUCKER and
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with
Petitioners.